

**DISTRICT COURT OF QUEENSLAND**

REGISTRY: Brisbane

NUMBER: *BD 3901/16*

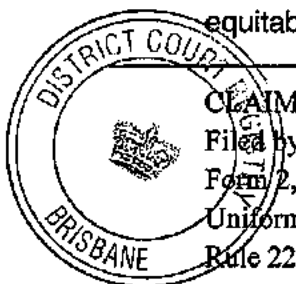
First Plaintiff : **JANET CRAVEN**  
AND  
Second Plaintiff : **GORDON JAMES CRAVEN**  
-v-  
First Defendant : **PENELOPE DJORDJEVIC (nee CRAVEN)**  
AND  
Second Defendant : **DAVID JAMES HAMBLETON**

**CLAIM**

The First Plaintiff claims :

**DECLARATIONS of Constructive Trust :**

1. A common intention Constructive Trust between the First Defendant as trustee for the Craven family beneficiary, be declared in accordance with the intent of the parties regarding the Property as pleaded at paragraphs 5 to 8.
2. In the event of a common intention Constructive Trust being declared at 1, in accordance with the intent of the parties as pleaded at paragraphs 14 and 15, it be declared that the beneficiary of that Constructive Trust be varied from the Craven family to the First Plaintiff.
3. In the circumstance pleaded at sub-paragraph 21(b) and paragraphs 22, a Constructive Trust be declared in favour of the First Plaintiff for the mortgage and improvement contributions that were put to the common intention of the Craven family.
4. In the circumstance of the pleadings at paragraph 49, a Constructive Trust be declared in favour of the First Plaintiff, because the First Defendant denied the equitable interest of the First Plaintiff and the Craven family.



**CLAIM**  
Filed by the Second Plaintiff  
Form 2, Version 2  
Uniform Civil Procedure Rules  
Rule 22

JANET & GORDON CRAVEN  
4 Spicer Street  
Gympie QLD 4570  
Phone No: 07 5482 8382  
Email: gordon@getmail.com.au

5. In the circumstance of the pleadings at paragraphs 136, a Constructive Trust be declared in favour of the First Plaintiff, for the \$38,971.33 that the Second Defendant distributed to himself.
- 5A. Alternatively, a declaration that the Second Defendant has been unjustly enriched by an amount of \$38,971.33.
6. In the circumstance of the pleadings at paragraphs 134(b), a Constructive Trust be declared in favour of the First Plaintiff, for the \$3,344.85 that was distributed to the First Defendant.
- 6A. Alternatively, a declaration that the First Defendant has been unjustly enriched by an amount of \$3,344.85.

**DECLARATIONS relating to paragraph 17 of the Statement of Claim :**

7. A declaration that the First Defendant held real property at 63 Nandroya Road, Cooroy being Lot 766 on RP 910330 (the Property) upon trust for the Craven family.
8. A declaration that from 22 October 2009 until the time of the sale of the Property, the First Defendant held the Property upon trust for the First Plaintiff.
9. A declaration that at all times material until the time of the sale of the Property, the Beneficiary had :
  - (a) a right of possession of the Property; and
  - (b) a right of residence at the Property.

**DECLARATIONS relating to paragraph 57 of the Statement of Claim :**

10. A declaration that the First Defendant had no power or authority to agree to and execute the Power of Attorney and the Deed of Settlement regarding the Property.
11. A declaration that the First Defendant had committed :
  - (a) a breach of trust to the Beneficiary;
  - (b) a breach of fiduciary duty to the Beneficiary;
  - (c) a denial of the existence of the trust and fiduciary duty by unconscionable conduct and equitable fraud.

12. A declaration that the Second Defendant knowingly assisted, induced or unduly influenced, the First Defendant to breach her obligations to the Beneficiary according to the second limb of *Barnes v Addy*.
13. A declaration that the Power of Attorney was ineffective.
14. A declaration that the Deed of Settlement was ineffective.
15. A declaration that the Property was non-divisible property.
16. A declaration that the Second Defendant's conduct in dealing with the Property was ultra vires.

**DECLARATIONS relating to paragraph 84 of the Statement of Claim :**

17. A declaration that the Second Defendant had knowingly caused multiple trespass on the Property.
18. A declaration that the Second Defendant had knowingly caused a continuing trespass on the Property.
19. A declaration that the circumstances surrounding the serving of the Form 15 Notice was unconscionable and of no effect.
20. A declaration that the Form 15 Notice was of no effect.
21. A declaration that the First Plaintiff did not abandoned the Property.
22. A declaration that the Second Defendant wrongly caused the eviction of the First Plaintiff from the Property.

**DECLARATION relating to paragraph 128.1 of the Statement of Claim :**

23. A declaration that the Second Defendant breached the Agreement.

**DECLARATION relating to paragraph 139 of the Statement of Claim :**

24. A declaration that the Second Defendant knowingly received the trust money as in the first limb of *Barnes v Addy*.

**DECLARATIONS relating to paragraphs 140 to 154 of the Statement of Claim :**

25. A declaration that the Second Defendant :
- (a) has conducted misfeasance in public office;
  - (b) alternatively, is in breach of duty.

**THE FIRST AND SECOND PLAINTIFFS CLAIM THE FOLLOWING DAMAGES**

1. In relation to paragraph 84 of the Statement of Claim, the First and Second Plaintiffs claim damages of \$150,000 from the Second Defendant for :
- (a) trespass; and
  - (b) continuing trespass; and
  - (c) wrongful eviction; and
  - (d) unconscionable conduct.
3. In relation to paragraph 104 of the Statement of Claim, the First and Second Plaintiffs claim damages of \$100,000 from the Second Defendant for :
- (a) aggravation of the trespass and wrongful eviction; and
  - (b) malice.
3. In relation to paragraph 111.1 of the Statement of Claim, the Defendants are jointly and severally liable for damages of \$8,575.00 for accommodation expenses.

**THE FIRST PLAINTIFF CLAIMS RELIEF BY REQUESTING THE COURT TO GRANT THE FOLLOWING ORDERS FOR SURRENDERING TRUST MONIES AND DAMAGES**

1. An order that the Second Defendant deliver to the First Plaintiff the \$38,971.33 component of proceeds of the sale of the Property, or any alternative amount that he has received.
- 1A. Alternatively, equitable damages in the sum of \$38,971.33.
2. An order that the First Defendant deliver to the Beneficiary the \$3,344.85 component of proceeds of the sale of the Property, or any alternative amount that she has received.

- 2A. Alternatively, equitable damages in the sum of \$3,344.85.
- 3. In relation to paragraph 109 of the Statement of Claim, the First Plaintiff claims damages of \$42,000 from the Second Defendant.
- 4. Interest on damages pursuant to section 58 of the Civil Proceedings Act 2011.

**THE SECOND PLAINTIFF CLAIMS RELIEF BY REQUESTING THE COURT TO GRANT THE FOLLOWING DECLARATIONS**

- 1. A declaration (relating to paragraphs 42 to 44) that the Second Plaintiff did not provide the deposit monies to purchase the Property.
- 2. A declaration (relating to paragraph 42 to 44) that the Second Plaintiff did not arrange for the title of the Property to be in the name of the First Defendant for the purpose of defeating creditors.
- 3. A declaration that the Second Plaintiff did not abandon the Property.
- 4. A declaration that the Second Defendant wrongly caused the eviction of the Second Plaintiff from the Property.

**CONCURRENT RELIEF FOR MISFEASANCE IN PUBLIC OFFICE / BREACH OF DUTY**

Damages for misfeasance in public office or breach of duty is claimed concurrently with the damages already claimed from the Second Defendant :

**PARTICULARS OF CLAIM BY FIRST PLAINTIFF**

- A. For the total amount of trust money received by the Second Defendant before distribution..... \$42,316.18
- B. For selling the Property for less than its potential..... \$42,000

**PARTICULARS OF CLAIM BY FIRST AND SECOND PLAINTIFFS**

- C. For accommodation expenses..... \$8,575
- D. For the :
  - (a) trespass; and
  - (b) continuing trespass; and
  - (c) wrongful eviction; and
  - (d) unconscionable conduct..... \$150,000
- E. For the aggravation of trespass and wrongful eviction..... \$100,000

**EXEMPLARY DAMAGES**

Exemplary damages are claimed against the Second Defendant for \$200,000

The plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.

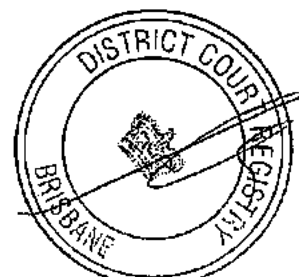
ISSUED WITH THE AUTHORITY OF THE DISTRICT COURT OF QUEENSLAND

And filed in the BRISBANE

Registry on

27 SEP 2016

Registrar:



To the defendants: TAKE NOTICE that you are being sued by the plaintiff in the Court. If you intend to dispute this claim or wish to raise any counterclaim against the plaintiff, you must within 28 days of the service upon you of this claim file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. The Notice should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it at the plaintiff's address for service shown in this claim as soon as possible.

Address of Registry: QEII Courts of Law Complex, 415 George Street, Brisbane Qld 4000

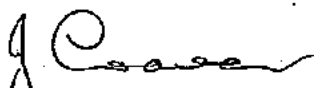
If you assert that this Court does not have jurisdiction in this matter or assert any irregularity you must file a Conditional Notice of Intention to Defend in Form 7 under Rule 144, and apply for an order under Rule 16 within 14 days of filing that Notice.

If you object that these proceedings have not been commenced in the correct district of the Court, that objection must be included in your Notice of Intention to Defend.

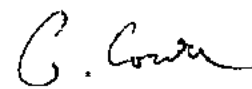
**PARTICULARS OF THE PLAINTIFFS:**

First Plaintiff's Name: Janet Craven  
Plaintiff's residential address: 4 Spicer Street, Gympie Queensland 4570  
Second Plaintiff's Name: Gordon James Craven  
Plaintiff's residential address: 4 Spicer Street, Gympie Queensland 4570  
Address for service: 4 Spicer Street, Gympie Queensland 4570  
Telephone: 07 5482 8382  
E-mail address: gordon@getmail.com.au

Signed:



First Plaintiff



Description:

Second Plaintiff

Dated: 27 September 2016

This Claim is to be served on: David James Hambleton  
of: Level 9 River Quarter  
46 Edward Street  
Brisbane Queensland 4000

and on: Penelope Djordjevic  
of: last known address  
63 Nandroya Road  
Cooroy Queensland 4563

**DISTRICT COURT OF QUEENSLAND**

REGISTRY: Brisbane

NUMBER:

First Plaintiff : **JANET CRAVEN**  
AND  
Second Plaintiff : **GORDON JAMES CRAVEN**  
-V-  
First Defendant : **PENELOPE DJORDJEVIC (nee CRAVEN)**  
AND  
Second Defendant : **DAVID JAMES HAMBLETON**

**STATEMENT OF CLAIM**

**The Statement of Claim in this proceeding is made in reliance of the following facts and transaction of events:**

|   | PARAGRAPHS     |
|---|----------------|
| PRELIMINARY MATTERS   | 1 to 4         |
| FIRST PLAINTIFF'S INTEREST & RIGHT OF POSSESSION IN THE COOROY PROPERTY | 5 to 17        |
| FIRST DEFENDANT'S REDUCED EQUITY, AND NON CONTRIBUTION                  | 18 to 22       |
| FIRST DEFENDANT'S SUB-TENANCY & ABANDONMENT & SECURITY OF THE PROPERTY  | 23 to 25.1     |
| SECOND DEFENDANT'S DUTIES AS A TRUSTEE IN BANKRUPTCY                    | 26 to 29       |
| BENEFICIARY'S INTEREST IN THE PROPERTY KNOWN TO THE SECOND DEFENDANT    | 30 to 32       |
| 'KNOWING ASSISTANCE' TO THE FIRST DEFENDANT'S BREACH OF OBLIGATIONS     | 33 to 57       |
| TRESPASS & EVICTION OF BENEFICIARY & SECOND PLAINTIFF FROM THE PROPERTY | 58 to 84       |
| AGGRAVATION OF THE WRONGFUL TRESPASS AND EVICTION BY DEFAMATION         | 85 to 104      |
| FURTHER DAMAGES AS A RESULT OF THE CONDUCT OF THE SECOND DEFENDANT      | 105 to 111.1   |
| THE BENEFICIARY'S CAVEAT AND RESULTING DISTRICT COURT PROCEEDING        | 112 to 118     |
| THE BREACH OF AGREEMENT TO PAY PROCEEDS OF SALE INTO COURT              | 119 to 128.1   |
| BREACH OF AGREEMENT FACILITATED 'KNOWING RECEIPT' OF TRUST MONEY        | 129 to 139     |
| MISFEASANCE IN PUBLIC OFFICE / BREACH OF DUTY                           | 140 to 154     |
| DECLARATIONS / DAMAGES / AGGRAVATED DAMAGES / EXEMPLARY DAMAGES         | pages 40 to 46 |

---

STATEMENT OF CLAIM  
Filed by the Second Plaintiff  
Form 16, Version 2  
Uniform Civil Procedure Rules  
Rules 22 and 146

JANET & GORDON CRAVEN  
4 Spicer Street  
Gympie QLD 4570  
Phone No: 07 5482 8382  
Email: gordon@getmail.com.au



## **PRELIMINARY MATTERS**

1. At all times material to this proceeding, the First Plaintiff was a person capable of suing and being sued and the wife of the Second Plaintiff; and
  - (a) was and is a non-debtor regarding the Second Plaintiff's bankruptcy.
  
2. At all times material to this proceeding, the Second Plaintiff was a person capable of suing and being sued and the husband of the First Plaintiff and on 5 March 2015 was declared a bankrupt.
  
3. At all times material to this proceeding, the First Defendant was a person capable of suing and being sued and is the daughter of the First and Second Plaintiffs.
  
4. At all times material to this proceeding, the Second Defendant was :
  - (a) a person capable of suing and being sued;
  - (b) a registered trustee in bankruptcy who administers the estate of bankrupts and the bankrupt Second Plaintiff in accordance with :
    - (i) the Bankruptcy Act 1966; and
    - (ii) the Bankruptcy Regulations 1996; and
    - (iii) the Inspector-General Practice Direction 14 - Proper performance of duties of a bankruptcy trustee.

## **FIRST PLAINTIFF'S INTEREST & RIGHT OF POSSESSION IN THE COOROY PROPERTY**

5. At all times material to this proceeding, there was an express common intention by way of a family agreement regarding the ownership of a Craven family home :
  - (a) the adult Craven family members that were party to the agreement consisted of the First Plaintiff, the Second Plaintiff and the Plaintiff's two daughters being the First Defendant and her sister Angela Craven;
  - (b) pursuant to the family agreement the First Defendant expressly agreed to be the nominal purchaser, obtain finance, and hold real property for the purpose of a Craven family home.
  
6. In reliance on the said common intention, on or about 17 August 2006 by dealing number 709932352 the First Defendant became the registered owner of real property at 63 Nandroya Road, Cooroy in Queensland being Lot 766 on RP 910330 (the Property) for the purpose as pleaded at paragraph 5.

## PARTICULARS

- A. A deposit of \$70,000 was paid by way of the First Defendant and her sister Angela Craven providing the whole of the \$70,000 deposit in equal shares of \$35,000;
  - B. The \$70,000 came from the sale of the Craven family home in Tasmania, the registered owners being the First Defendant and Angela Craven;
    - (i) in 1999, the First Plaintiff and the Second Plaintiff had contributed a \$20,000 deposit towards the purchase of the Tasmanian family home;
    - (ii) the First Defendant and her sister Angela arranged a bank loan for the balance of funds to purchase the Tasmanian family home;
    - (iii) the First and Second Plaintiffs resided at the family home and from time to time their two daughters Penelope and Angela also resided there until sold in early or mid 2006;
    - (iv) the First and Second Plaintiffs paid rent to their daughters which in effect serviced the mortgage loan;
    - (v) when the family home was sold in 2006 the proceeds were paid into the bank account of the First Defendant and her sister Angela;
  - C. The purchase price of the Cooroy Property was \$350,000;
  - D. Given that a \$70,000 deposit was paid from the said proceeds at (v), the First Defendant arranged a loan from the Bendigo Bank for approximately \$280,000 for the balance of the purchase price for the Property;
  - E. The First and Second Plaintiff's agreed with the First Defendant that the First Defendant would not be responsible for the mortgage repayments to the bank or any other payments regarding the Property such as rates, electricity and insurance, as those payments would be made from income generated by the trading activities of an online florist business named Penny's Flowers as well as leasing parts of the Property to family members;
  - F. The trading and leasing activities were to be performed by the First Plaintiff and the Second Plaintiff.
7. In the circumstances as pleaded at paragraphs 5 and 6, the Property was held in a trust by the First Defendant as registered owner and trustee for the Craven family as beneficiary of the Property being the trust estate.
  8. Further to paragraph 7, the First Defendant had a fiduciary duty as trustee of the Property for the Craven family beneficiary.

9. In January 2007 the company Penny's Flowers Pty Ltd (the Company) was registered for the purpose of the trading and leasing activities to fund the mortgage re-payments and all other outgoings regarding the Property.

#### **PARTICULARS**

- A. The First Defendant was the sole director and shareholder of the Company;
- B. The First Defendant played no part in the trading and leasing activities of the Company or making mortgage repayments or any payments regarding the Property;
- C. On 7 February 2007 the First Defendant leased the whole of the Property via a written periodic tenancy / lease agreement to the Company in order for the Company to undertake its trading activities and sub-lease parts of the Property to family members;
- D. The First and Second Plaintiffs subsequently undertook a written periodic sub-tenancy / lease from the Company for the purpose of residing at the Property;
- E. At various times within the following 9 or so years, the the First Defendant and her sister Angela resided at the Property via respective tenancy agreements with the Company for which they paid rent to the Company and where the Company also supplied free electricity, telephone and internet;
- F. The First Plaintiff was the primary manager and contributor to the florist operations of the Company by way of working 7 days a week as necessitated by the incoming orders, during the published business operating hours between 7am to 7pm :
  - (i) ordering florist supplies stock;
  - (ii) flower ordering, sorting and care;
  - (iii) taking customer telephone orders and payments;
  - (iv) making the flower arrangements for the customer orders;
  - (v) maintaining fresh arrangements at the roadside stall;
  - (vi) sometimes delivering customer orders;
  - (vii) maintaining cleanliness in a cut flower environment of workroom and coldroom;
  - (vii) dealing with face to face retail customers such as weddings and events;
  - (viii) dealing with retail roadside stall customers;
- G. The Second Plaintiff's role was to maintain administration of the online florist websites, receive online orders, attending auctions and online auctions to buy flowers, and make deliveries of flower orders;
- H. In May 2011 the First Defendant shares were transferred to the First Plaintiff whereupon the First Plaintiff became the owner of the Company and the Second Plaintiff became the sole director;
- I. In August 2014 the Company ceased trading due to the First Plaintiff's illness.

10. By reason of :

- (a) the First Defendant trustee intended marriage on 1 November 2008; and
- (b) in order to have the First Defendant re-affirm the Craven family agreement that the Property was held as a Craven family home; and
- (c) to change the Craven family beneficiary of the trust pleaded at paragraph 7, to the First Plaintiff;

In October 2008, the First Plaintiff solicitor prepared a Declaration of Trust document (the Document) for the First Plaintiff and the First Defendant to execute.

11. When executed on 22 October 2008, the document was compliant with section 45 of the Property Law Act 1974 but cannot be used as evidence in this proceeding as it has not been stamped pursuant to section 487(1) of the Duties Act 2001.

12. The Document has been assessed as a Declaration of Trust by the Office of State Revenue, with duty payable being \$20,098.74 including approximately 8 years of interest by transaction number 512182643 dated 7 July 2016 and :

- (b) the Office of State Revenue now demands payment of the \$20,098.74 from the First Plaintiff plus further accruing interest at \$20.37 per week; and
- (b) pursuant to section 64(1) of the Duties Act 2001, the First Defendant has the primary liability to pay the transfer duty due on the Document.

13. The Document currently serves to authenticate and provide a memory refreshment and time stamp to the matters pleaded at paragraphs 14 to 16 below.

14. Prior to the execution of the Document at the Property on 22 October 2008, in the presence of all the adult Craven family members, and with their agreement, the First Defendant orally acknowledged and agreed to the following terms of agreement in preparation to execute the Document :

- (a) that she held the Property as a family home on trust for the Craven family;
- (b) that her intended husband or his sons were not to have a claim on the Property;
- (c) the Craven family beneficiary be changed to the First Plaintiff as beneficiary;
- (d) she would provide the First Plaintiff with her power of attorney regarding any sale of the Property if requested to do so by the First Plaintiff;
- (e) in the event of the Property being sold, any proceeds coming to her would be paid to the First Plaintiff to distribute amongst Craven family members as the First Plaintiff saw fit;

- (f) that neither herself or her intended husband would be responsible for any mortgage repayments and outgoings regarding the Property, as all such payments were to be made by the Company;
- (g) she would not use the Property as security for any loan without the First Plaintiffs consent.

15. By the First Defendant orally acknowledging and agreeing to the matters (a) to (g), of paragraph 14, the equity pleaded at paragraph 7 continued independently of the Document and the Craven family beneficiary was varied to make the First Plaintiff the beneficiary, who is hereinafter referred to as "the Beneficiary".

#### **PARTICULARS**

The effect of the oral agreement was to create a sub-trust, making the Beneficiary a trustee of that sub-trust for the Craven family, to distribute proceeds of sale amongst Craven family members as the Beneficiary saw fit, should the Property be sold.

16. Consequently, at all times material until the Property was sold on or about 15 March 2016, the Beneficiary had the right of possession of the Property along with a right of residence at the Property by reason of :
- (a) the express common intention of the family agreement;
  - (b) the agreement with the First Defendant as pleaded at paragraphs 14 and 15;
  - (c) from May 2011 being the owner of the Company who leased the Property;
  - (d) being a sub-tenant of the Company;
  - (e) being absolutely entitled by virtue of being a Beneficiary.
17. Declarations resulting from paragraphs 5 to 16 are applied for in the Claim.

#### **FIRST DEFENDANT'S REDUCED EQUITY AND NON CONTRIBUTION**

18. In September 2009 with the consent of the Beneficiary, the First Defendant re-financed the Property by way of a loan for \$308,000 from which she drew \$20,000 from surplus funds for her own use.
19. The \$20,000 was a loan out of her \$35,000 equity referred to at particular 6A which she put into the Craven family home. The \$20,000 has not been repaid, and consequently the Beneficiary was to take this into consideration when distributing proceeds pursuant to sub-paragraph 14(e), and particulars at paragraph 15 in the event that the Property was sold.

20. As a result of matters pleaded at paragraphs 18 and 19, the First Defendant's initial equity put into the Craven family home being \$35,000 was reduced by the \$20,000 loan, leaving the First Defendant with an equity of \$15,000.
21. At all times material to this proceeding :
- (a) as per the agreement pleaded at particulars 6E and sub-paragraph 14(f), the First Defendant made no contribution whatsoever to the mortgage or any other payments regarding the Property; and
  - (b) all such payments having been made by the Company via its rental and florist activities which the First Defendant also played no part in, as per particular 9B.
22. Further, the First Defendant made no contribution whatsoever to any improvements made to the Property by the Company during the years between 2006 to 2015 and accepted the improvements to be part of the common intention as pleaded at paragraph 5.

#### **PARTICULARS OF IMPROVEMENTS**

- A. installation of boundary fencing and gates;
- B. installation of a solar hot water system;
- C. clearing and landscaping on the 3,324 m<sup>2</sup> block;
- D. substantial planting of varieties of native & flowering trees, shrubs & fruit trees;
- E. installation of 2 extra water tanks with pumps;
- F. installation of 2 shipping containers for storage;
- G. installation of 4 air conditioners;
- H. installation of a coldroom with refrigeration under the main house;
- I. building a workroom with kitchenette under the main house;
- J. building a bathroom under the main house;
- K. building a 10 x 3.6 metre cabin with deck and Huon Pine kitchen (the Cabin) at the rear of the Property for the Beneficiary and the Second Plaintiff to reside, in which they did reside;
- L. installation of the NBN at the main house;
- M. installation of Foxtel at the main house and the Cabin.

#### **FIRST DEFENDANT'S SUB-TENANCY & ABANDONMENT & SECURITY OF THE PROPERTY**

23. On 25 February 2014 the First Defendant made a periodic tenancy agreement with the Company for occupation of the main house on the Property and occupied the house along with her husband, who was not a party to the tenancy agreement, but resided there at the invitation of the First Defendant.

- 23.1 The First Defendant's husband (the husband) :
- (a) on 18 May 2015, stole the newly installed NBN power supply belonging to NBN Co Ltd and a data cable rendering the NBN inoperable; and
  - (b) assaulted the Second Plaintiff by pushing him over; and
  - (c) during the following weeks acted in a harassing and objectionable manner towards the Second Plaintiff and in particular the Beneficiary.
- 23.2 On 19 June 2015 the First Defendant abandoned her sub-tenancy :
- (a) without giving notice to leave as required by the Residential Tenancies and Rooming Accommodation Act 2008 (the Act); and
  - (b) failing to pay rent due; and
  - (c) without returning the keys pursuant to the tenancy agreement; and
  - (d) without providing a forwarding address; and
- whereupon she and the husband became estranged from the Beneficiary and the Second Plaintiff, apart from an email address.
- 23.3 Over the weekend of 20 and 21 June 2015 the husband returned to the Property, entered the main house and stole further property consisting of the power supply for the backup ADSL modem belonging to the Second Plaintiff, rendering that backup internet facility inoperable as well.
- 23.4 On the Beneficiary and Second Plaintiff's inspection of the main house it was noticed that there was damage to one of the bathrooms and multiple scorching damage to the kitchen bench top which was clearly not accidental.
- 24 Given the husband's propensity for theft, assault, harassing and objectionable conduct and the main house being vacant, the Beneficiary and the Second Plaintiff thereafter ensured that the gates on the Property were chained and padlocked at all times including when they were at home, which was at the rear of the Property in the Cabin.
25. The Company issued a Form 15 Abandonment Notice pursuant to the Act on 20 June 2015 and delivered it by email, Facebook and ordinary prepaid mail with return address on the envelope, to the First Defendant at 63 Nandroya Road Cooroy knowing that her mail was being post office re-directed to an address unknown to the Plaintiffs.
- 25.1 The Form 15 notice was not responded to or returned undelivered, accordingly it was taken that the First Defendant did not dispute the notice.

## **SECOND DEFENDANT'S DUTIES AS A TRUSTEE IN BANKRUPTCY**

26. The duties of the Second Defendant as a trustee in bankruptcy as per sub-paragraph 4(b) are to follow the :
- (a) the Bankruptcy Act 1966; and
  - (b) the Bankruptcy Regulations 1996; and
  - (c) the Inspector-General Practice Direction 14 - Proper performance of duties of a bankruptcy trustee (IGPD).
27. The Second Defendant has a duty to comply with part 4 of the IGPD which includes :
- 4. Trustees as fiduciaries and officers of the Court.
    - 4.1 *A trustee in bankruptcy is classed as a fiduciary. 'Fiduciary' is a term that may be defined in various ways but, essentially, it involves a person who has an obligation to act on behalf of another, subject to certain duties. In particular, a person who is a fiduciary generally owes two types of duties to those with whom he or she is in professional contact.*
    - 4.2 *These are:*
      - *duty to use care and skill; and*
      - *a duty to act in good faith.*
    - 4.3 *The duty to use care and skill is allied to common law obligations. A person may be under a contract whose terms, express or implied, require that person to use skill and care. Furthermore, such a person may owe a duty of care under the law of negligence. The way in which the common law duties are vindicated are by an award of damages to the person damaged by the conduct. With the breach of a statutory duty in the nature of a fiduciary duty, the remedy may be set out in the relevant statute or it may be an order that the defaulting fiduciary restore the fund or person to the state it or he/she would have been in but for the breach.*
28. The Second Defendant has a duty to comply with the Bankruptcy Regulations 1996 at schedule 4A (minimum level of acceptable conduct and performance standards for trustees) (inter alia) which includes :
- (a) **2.2 Duty to act honestly and impartially;**  
*The trustee must act honestly and impartially in relation to each administration....*



(b) **2.9 Ownership or interests in assets;**

*In determining the ownership of, or an interest in, an asset that is part of divisible property, the trustee must act reasonably and claim only the amount that fairly represents the interest in, or value of, the asset.*

29. The Second Defendant has a duty to comply with the Bankruptcy Act 1966 at sub-sections 19(j) and (k) which provide :
- administering the estate as efficiently as possible by avoiding unnecessary expense;
  - exercising powers and performing functions in a commercially sound way.

**BENEFICIARY'S INTEREST IN THE PROPERTY KNOWN TO THE SECOND DEFENDANT**

30. The Beneficiary via her solicitor and the Second Plaintiff, had asserted her equitable interest in the Property to the Second Defendant.

**PARTICULARS OF ASSERTIONS**

- A. By email correspondences dated 24 June 2015 per paragraphs 34 below;
  - B. By telephone discussion on or about 26 June 2015 between the Beneficiary's solicitor and the Second Defendant;
  - C. By letter of 24 July 2015 to the First Defendant published on the internet and coming to the attention of the Second Defendant and his solicitor;
  - D. By emailed letter of 12 August 2015 attaching a copy of the Document referred to at paragraphs 10 to 13, to the Second Defendant;
  - E. By letter of 12 August 2015 advising the Second Defendant that the First Defendant had no power to deal in the Property, and that the Second Defendant would need to obtain a Court order to say otherwise;
  - F. By the Second Plaintiff's letter for the Beneficiary dated 17 September 2015 to Wythes, forwarded to Second Defendant giving notice of the Beneficiary's interest in the Property;
  - G. By the Beneficiary's caveat per paragraph below 112;
  - H. By initiating the 150/15 proceeding on 21 October 2015 per paragraphs 114 below and and the primary claim for a declaration as set out at paragraph 115.
31. The Second Defendant made numerous assertions or admissions identifying that the Beneficiary held an interest the Property.

**PARTICULARS**

- A. Letter dated 7 May 2015 from the Second Defendant to the First Defendant which identified an interest of the Beneficiary;

- B. Email of 21 August 2015 from the Second Defendant's solicitor stating that the Beneficiary would receive 50% of proceeds of sale;
- C. Letter from Second Defendant's solicitor dated 11 September 2015 offering to pay proceeds to the Beneficiary instead of First Defendant;
- D. Letter from Second Defendant's solicitor dated 1 December 2015 offering to pay 25% of the proceeds of sale to the Beneficiary;
- E. Letter from Second Defendant's solicitor dated 24 September 2015 offering 50% of proceeds of sale to the Beneficiary;
- F. Paragraph (xi) of the *Deed of Release and Indemnity* dated 26 August 2015 referred to at paragraph 56 below, which provides that instead of the residual balance of proceeds of sale being paid to the First Defendant, it was to be paid to the Beneficiary;
- G. Similar provisions are made at terms 2.1(b) and 2.1(c) of the *Deed of Release and Indemnity*;
- H. Term 2.4(j) of a proposed deed of settlement drafted by the Second Defendant that proceeds of sale be dispersed between the Beneficiary and the Second Defendant;
- I. Letter from Second Defendant's solicitor dated 4 March 2016, proposing that First Defendant holds the Property on trust equally for the Beneficiary and the Second Plaintiff, and again proposing that the Court in the 150/15 proceeding declare First Defendant holds the Property on trust equally for the Beneficiary and the Second Plaintiff;
- J. Application by the Second Defendant to the District Court dated 4 March 2016 :  
*"That it be declared the Second Defendant by Counterclaim holds the Property at 63 Nandroya Road, Cooroy (being Lot 766 on RP 910330) on trust equally for the First Defendant by Counterclaim and Gordon James Craven (a bankrupt)"*
- K. By letter dated 23 March 2016 from the Second Defendant's solicitor asserting that the Beneficiary's has an interest by stating :  
*"The position asserted by the Second Defendant is that the property was in fact held on resulting trust in favour of both Janet and Gordon Craven in equal shares"*
- L. Paragraphs 1 and 5 of the relief claimed in the Second Defendant's Amended Counterclaim in the 150/15 proceeding filed 10 February 2016 which identify the interest of the Beneficiary.

32. By reason of paragraphs 30 and 31, the Second Defendant was aware that the Beneficiary held an interest in the Property.

## **KNOWING ASSISTANCE TO THE FIRST DEFENDANT'S BREACH OF OBLIGATIONS**

33. On 11 May 2015, the Beneficiary became aware that the Second Defendant was investigating the estate of the Second Plaintiff in bankruptcy, as regarding his potential interest in the Property for vesting in the Second Defendant, as the trustee in bankruptcy of the Second Plaintiff.
34. After the First Defendant's abandonment of her tenancy on 19 June 2015 as pleaded at paragraphs 23 to 25.1, on 24 June 2015 the Beneficiary through her solicitor, proposed the following by email (*email 1*) to the First Defendant :
- "Hi Penny, your mother proposes that you grant me a power of attorney (I understand that you have declined to give her one) to sell the house which technically belongs to her. Is that acceptable please? It will save you going through the whole procedure yourself."*
35. By email (*email 2*) dated 24 June 2015, the First Defendant forwarded email 1 to Paris Parasidi for the Second Defendant.
36. By return email dated 24 June 2015 (*email 3*), from the Second Defendant to the First Defendant, the Second Defendant acknowledged receipt of email 2 and also stated in that email :
- *Penny,*  
*Thank you for your call today.*  
*I confirm that we had reached a settlement whereby you will provide us with a Power of Attorney to sell your property and we will split the net proceeds as per the terms of our settlement.....*
  - *.....Please send the following email,*  
*I authorise Mr David Hambleton to act on my behalf and speak with the legal representative(s) of Mrs Janet Craven, in order to determine the nature of her claim against my property. It is imperative that this occur as I am unable to service the mortgage on the property, or pay for legal representation in a situation whereby I have already resolved any valid claims against the property. Mrs Janet Craven does not hold title, nor an equitable interest, in my property.*  
*Regards*  
*David Hambleton Director*

37. By return email to the Second Defendant dated 25 June 2015 (*email 4*), the First Defendant replied to email 3 whereby she repeated the Second Defendant's request verbatim :

*I authorise Mr David Hambleton to act on my behalf and speak with the legal representative(s) of Mrs Janet Craven, in order to determine the nature of her claim against my property. It is imperative that this occur as I am unable to service the mortgage on the property, or pay for legal representation in a situation whereby I have already resolved any valid claims against the property. Mrs Janet Craven does not hold title, nor an equitable interest, in my property.*

*Thank you,*

*Penny Djordjevic*

38. The First Defendant's return of email 4 giving authority to the Second Defendant was in the circumstances of :

- (a) the Second Defendant wishing to avoid any litigation to get a Court order to sell the Property; and
- (b) the First Defendant wishing to avoid Court interrogation by the Second Defendant which he had threatened the First Defendant with in the course of settlement negotiations identified in the email at paragraph 36 above (*email 3*), together with recovery of Court costs; and
- (c) the Second Defendant's offering to split the net proceeds 50/50 with the First Defendant on the sale of the Property.

- 38.1 Further to paragraph 38, the Second Defendant knew the vulnerability of the First Defendant by way of her being concerned about being;

- (a) unemployed and never having been in this legal situation before; and
- (b) sued by the First Plaintiff; and
- (c) unable to pay for legal representation; and
- (d) not obtaining legal advice; and
- (e) unable to service mortgage repayments on the Property (previously serviced by the Company); and
- (f) unable to afford the payments on her credit card; and
- (g) the Second Defendant having knowledge of the First Defendant's hostile attitude towards the Beneficiary and Second Plaintiff.

39. In the premises of paragraphs 38 and 38.1, while the Second Defendant knew of the Beneficiary's assertion of an equitable interest in the Property by way of the email pleaded at paragraph 34 having been received by him, the Second Defendant :
- (a) induced; and/or
  - (b) assisted; and/or
  - (c) unduly influenced;
- the First Defendant to repeat verbatim his instructions as per paragraphs 36 and 37, which is hereinafter referred to as the ***induced statement***.
40. The following component of the ***induced statement*** ;
- "Mrs Janet Craven does not hold title, nor an equitable interest, in my property"*
- by the First Defendant was knowingly dishonest, false and a fraud upon the Beneficiary regarding "*equitable interest*" by reason of the matters pleaded at :
- (a) paragraphs 5 to 16; and
  - (b) the First Defendant's minimal equity, per paragraph 20; and
  - (c) the First Defendant's zero contribution to the mortgage or other contributions regarding the Property, per paragraphs 21 and 22; and
  - (d) the Beneficiary's initial assertion via her solicitor, of an equitable interest in the Property as pleaded at paragraph 34; and
  - (e) the Second Defendant having no factual basis for suggesting this fallacy; and
  - (f) the First Defendant having no factual basis for agreeing to the fallacy.
41. The ***induced statement*** was conducive to both Defendants coming to agreement regarding the Property which was reduced to writing and called a ***deed of settlement*** and dated 26 June 2015, which was confidential to the Defendants with the Beneficiary being refused knowledge of the contents and terms.

#### PARTICULARS OF RELEVANT TERMS OF THE DEED OF SETTLEMENT

- A. The First Defendant to provide the Second Defendant with a Power of Attorney;
- B. The Property to be sold;
- C. The avoiding of litigation by the Second Defendant to get a Court order;
- D. The Second Defendant to have his legal fees paid out of the total of the net sale proceeds of sale of the Property;
- E. After the legal fees are paid, the remaining net proceeds of the sale of the Property be split 50/50 in equal shares between the Defendants;
- F. The Power of Attorney to be irrevocable;
- G. The ***deed of settlement*** to be confidential;
- H. The pursuit of any legal action to evict, lockout or remove the First and Second Plaintiffs and their chattels from the Property.

42. The confidential **deed of settlement** further contained the following "background" terms confidentially agreed to between the Defendants :

(iv) *At the time of Craven becoming the sole registered owner of the Property, the Bankrupt Gordon Craven provided the deposit monies to purchase the Property from the sale proceeds of properties previously owned by him.*

(v) *The Bankrupt Gordon Craven sought to vest his right, title and interest in the name of his daughter Craven to defeat creditors.*

- 42.1
- "Craven" being the First Defendant in the current proceeding; and
  - the "Bankrupt Gordon Craven" being the Second Plaintiff in the current proceeding.

43. The confidential background terms :

(a) (iv), in the **deed of settlement** was a total falsehood, by reason of the matters pleaded at paragraph 6; and

(b) (v), in the **deed of settlement**, was also a total falsehood.

44. Further to the term (v), at the time of the First Defendant becoming the sole registered owner of the Property, the Second Plaintiff :

(a) had no creditors; and

(b) had no potential or impending creditors; and

(c) was not insolvent; and

(d) was not about to become insolvent; and

accordingly, the Second Defendant had no factual basis to support this falsehood.

45. The Second Defendant did not :

(a) invite information from the Beneficiary or Second Plaintiff; or

(b) provide an opportunity for them to rebut the confidential fallacies being contrived to establish the **induced statement** and **deed of settlement**.

but instead chose to rely on the fabricated and spurious confidential input from the First Defendant, that the Second Defendant had induced.

46. In execution of the term pleaded at particulars 41A, and to enable the Second Defendant to give effect to the **deed of settlement**, the First Defendant appointed the Second Defendant as her attorney by way of the enduring Power of Attorney dated 27 June 2015 which had the registered number 716613321 and was made irrevocable by term 2.5(a) of the **deed of settlement**.

47. Clause 3 of the Power of Attorney provided :
- My attorney is authorised only to exercise this attorney in relation to the marketing, sale and dealing with the tenancies of 63 Nandroya Road, Cooroy QLD 4563 and any other matters incidental to the sale of the property as required by a **deed of settlement** between my attorney and I executed contemporaneously with this Enduring Power of Attorney.*
48. The First Defendant was bound to account to the Beneficiary by reason of the matters pleaded at paragraphs 5 to 8 and paragraphs 14, 15, 21 and 22.
49. The First Defendant's entry into the Power of Attorney and **deed of settlement** documents regarding the future of the Property;
- (a) was without the consent of the Beneficiary and accordingly the First Defendant had failed in her obligations towards the Beneficiary; and
  - (b) consequently, the First Defendant had no power or authority to agree to and execute the documents without the Beneficiary's consent, and by doing so;
    - (i) was knowingly and recklessly dishonest and indifferent to the Beneficiary's interest; and
    - (ii) breached the trust owed to the Beneficiary; and
    - (iii) breached the fiduciary duty owed to the Beneficiary; and
    - (iv) unconscionably and by equitable fraud, denied there was a trust for the Beneficiary's equitable interest in the Property.
50. In the circumstances of paragraph 49, the elements of a Constructive Trust arose for the common intention matters pleaded at paragraphs 5 to 8 and paragraphs 14 to 16, and for the contributions made per sub-paragraph 21(b) and paragraph 22 for which the Beneficiary seeks declarations as set out in the Claim in this proceeding.
51. The settlement negotiations between the First and Second Defendants that resulted in:
- (a) the Power of Attorney; and
  - (b) and **deed of settlement** ; and
  - (c) the **induced statement** ; and
  - (d) the said fallacies and falsehoods;
- were in order for the Second Defendant to gain legal authority and control over the Property without having to apply for a Court order.

52. Given the First Defendant had no power or authority to agree to and execute the documents without the Beneficiary's consent as pleaded at paragraph 49, the legal authority and control that the Second Defendant thought he gathered from the Power of Attorney and **deed of settlement**, was ineffective.
53. In seeking his ineffective authority and control, and by ignoring the Beneficiary's interest that had been asserted by the email pleaded at paragraph 34, and not seeking further information regarding that interest as per paragraph 45, the Second Defendant in inducing the First Defendant to breach her obligations, had:
- (a) actual knowledge of the Beneficiary's equitable interest; and
  - (b) wilfully closed his eyes to that equitable interest; and
  - (c) wilfully and recklessly failed to make inquiries that an honest and reasonable person would have made regarding that equitable interest; and
  - (d) was recklessly indifferent to the harm that is likely to ensue by ignoring that equitable interest.
54. For the Second Defendant to arrive at his assumed authority when he had none because of the ineffective Power of Attorney, he had '*knowingly assisted*' the First Defendant's to her breach of obligations as pleaded at paragraph 49, as in the second limb of **Barnes v Addy**.
55. In the premises of an ineffective Power of Attorney, and no Court order, the Second Defendant had :
- (a) no authority to deal with the Property because it remained non-divisible property and unavailable to the Second Defendant as a trustee in bankruptcy performing functions of the Bankruptcy Act; and
  - (b) consequently, the Second Defendant's dealing with the Property was ultra vires and outside the scope of a trustee in bankruptcy performing functions of the Bankruptcy Act, in only being able to deal in divisible property.
56. Subsequent to the **deed of settlement**, in a further agreement between the First Defendant and Second Defendant, another confidential document regarding the Property titled **deed of release and indemnity** dated 26 August 2015 had been executed, and repeated the same said fallacious "background" terms (iv) and (v).
57. As a consequence of the matters at paragraph 33 to 56, the Beneficiary seeks declarations as set out in the Claim in this proceeding.



## **TRESPASS & EVICTION OF BENEFICIARY & SECOND PLAINTIFF FROM THE PROPERTY**

58. The *deed of settlement* at 2.2(c) contained the following term:

*pursue any legal action required to evict, lockout or remove the Tenants and the Tenant's personal chattels from the Property.....;*

consequently the Second Defendant acting under the said ineffective Power of Attorney, caused his licensed field agent or agents acting within the scope of the Second Defendant's authority, to enter beyond the fence, locked gates and no entry signs of the Property, multiple times.

59. The First Defendant had no authority at all, to enter or cause or authorise entry beyond the fence and locked gates of the Property without the consent of the lawful tenants as pleaded at particulars 9C and 9D, because :

- (a) she had leased all of the Property to the Company per particulars 9C; and
- (b) because of the lease, she had no authority or ability to provide authority to the Second Defendant or anyone, to enter to the Property without obeying the rules of entry under the Act; and
- (c) she had no authority from the Beneficiary contrary to what her trustee and fiduciary obligations required, derived from matters pleaded at paragraphs 5 to 8 and 14 to 16; and
- (d) she was not able to enter the Property, or provide authority to enter under her tenancy as pleaded at paragraph 23, by reason of abandoning that tenancy as pleaded at paragraphs 23.1 to 25.1, which removed any authority to return that she may have had.

60. By reason of matters pleaded at paragraph 59 and his Power of Attorney being ineffective as pleaded at paragraph 52 and the matters pleaded at paragraph 55, the Second Defendant had no authority at all, to cause or authorise his agent/s to enter inside the fully fenced Property with locked gates and no entry signs attached, without the consent of the lawful tenants.

60.1 Given the matters pleaded :

- (a) at paragraphs 23.1 to 24 regarding the husband's conduct; and
- (b) at sub-paragraph 61.1(d) below, regarding the Second Defendant's agent's trespass on 27 July 2015; and
- (c) the sub-tenant Plaintiffs living in the Cabin at the rear of the Property; the gates were always locked whether the Beneficiary and the Second Plaintiff sub-tenants were home in the Cabin, or not at home.

61. Without the consent or knowledge of the tenants, the Second Defendant caused the multiple entries to the Property by agents acting on his behalf on the following dates :
- (a) the weekend of 22 / 23 August 2015; and
  - (b) Friday 28 August 2015; and
  - (c) Saturday 29 August 2015; and
  - (d) Tuesday 8 September 2015.
- 61.1 All the multiple entries were made when the gates were locked and the entries were illegal trespass because :
- (a) the rules of entry under the Act were not complied with; and
  - (b) the no entry signs and locked gates; constituted a *Notice Not To Trespass* (NNTT) that revoked any implied licence to enter the Property; and
  - (c) the knowledge of the NNTT by licensed agents acting for and on behalf of the Second Defendant was imputed to the Second Defendant principal under their agency relationship; and
  - (d) on 27 July 2015 an agent of the Second Defendant, was found on the Property and was told to leave by the Second Plaintiff because he was trespassing and was further told not to come back and trespass again. The incident;
    - (i) caused the agent to deposit what he was serving in the mailbox at the front of and outside the Property's fence; and
    - (ii) constituted the original NNTT that revoked any implied licence to enter the Property or enter the Property in the future; and
    - (iii) the knowledge of the original NNTT by the agent acting for and on behalf of the Second Defendant was imputed to the Second Defendant principal under their agency relationship.
- 61.2 Given the circumstances at paragraphs 59 to 61.1, it was incumbent on the First Defendant and Second Defendant to post or deposit any notices in the locked mailbox outside the fence and locked gates, being the mailbox for the registered office of the Company and the sub-tenants and such delivery being compliant with the service of notices under the Act; and/or
- (a) by email to the Beneficiary as a sub-tenant and owner and director of the Company tenant, and requesting confirmation of service; and/or
  - (b) by email to the Second Plaintiff as sub-tenant of the Company tenant.
62. The Second Defendant was well aware of the said email addresses by being the Second Plaintiffs trustee in bankruptcy and along with his solicitor, using the emails many times, including exchange of emails during the actual period of the purported abandonment.

63. The exchange of emails during that period, inter alia, dealt with matters relating to the delivery of notices to the Property, and where no mention of the Form 15 Notice was made by the Second Defendant or his solicitor.

#### **PARTICULARS**

- A. while the Beneficiary and the Second Plaintiff were in attendance at the Property on Monday 7 September 2015 during the purported period of abandonment, a sealed envelope addressed to “Penelope Craven” the First Defendant, was found on the floor the main house on the Property; and
- B. realising that the envelope could only have been placed by trespass, the Second Plaintiff immediately wrote by email to the Second Defendant, and to the address appearing on the back of the envelope Commercial and Process Services Australia Pty Ltd, giving notification to the process server agent that was imputed to the Second Defendant principal, that :
- (i) he was a tenant of the Property and demanding a cease and desist from trespass on the Property;
  - (ii) providing instructions to use the mailbox at the front of the Property for delivery of notices, otherwise a complaint to Police would be made;
  - (iii) requesting what should be done with the envelope;
  - (iv) the email constituted an even further NNTT, imputed to the Second Defendant to those pleaded at paragraph 61.1;
- C. a reply was received on 7 September 2015 at 3-09pm from the Second Defendant advising that he was out of the office on medical leave and to re-send the email to his Ms. Kim Dubickas which was done at 3-29pm.
64. Instead of using one or more of the means of service at paragraph 61.2, the multiple entries by trespass were against the express wishes of Beneficiary and the Second Plaintiff tenants by reason of the NNTTs.
65. All the multiple trespasses caused by the Second Defendant were intentional when :
- (a) the Second Defendant was in possession of copies of all the tenancy agreements; and
  - (b) the Second Defendant knew of the NNTTs.

#### **PARTICULARS OF RELEVANT TENANCY AGREEMENTS**

- A. The First Defendant's periodic tenancy to the Company starting on 7 February 2007;
  - B. The Company's periodic tenancy to the Beneficiary and Second Plaintiff starting on 25 June 2007;
  - C. The Company's replacement periodic tenancy to the Beneficiary and Second Plaintiff starting on 20 August 2013;
66. The illegal entry by trespass caused by the Second Defendant's agent on Saturday 29 August 2015, was to serve a Form 15 Abandonment Notice (the Notice) issued by the First Defendant to the Company under the provision of section 355 of the Act, and signed by the Second Defendant as Power of Attorney for the First Defendant.
- 66.1 In the premises of :
- (a) the First Defendant being bound to account to the Beneficiary by reason of the matters pleaded at paragraphs 5 to 8 and paragraphs 14 to 16 and paragraphs 21 and 22; and
  - (b) the First Defendant being trustee for the Beneficiary, and the Notice affecting the Beneficiary's right in possession and residence at the Property, the First Defendant had no power or authority to issue the Notice; and
  - (c) accordingly, by the First Defendant having no power or authority, there was no power or authority that could be imputed to the Second Defendant to cause the Notice to be issued and served; and
  - (d) given the Second Defendant's ineffective Power of Attorney, no power or authority existed in that document either.
67. Once inside the Property's fence and locked gates with no entry signs attached, the Second Defendant's agent placed the Notice where it was unlikely to be found, and was not found.
68. The Notice was chosen to be served by trespass :
- (a) when trespass was expressly forbidden by way of the NNTTs; and
  - (b) when postal service would have been effective, and in compliance with the rules of entry under the Act; and
  - (c) when unauthorised entry to the Property constituted breaches of the legislations referred to at sub-paragraph 80(b) below; and

- (d) so that the tenants would likely not find the Notice by reason of its placement per paragraph 67; and
  - (e) thereby causing substantial distress and humiliation to the Beneficiary & Second Plaintiff on finding out the matters at paragraphs 71 to 76.1 below; and
  - (f) the Beneficiary and Second Plaintiff being sub-tenants of the Company, being affected by the Notice but receiving no notice of the Notice.
69. The First Defendant as the issuer of the Notice, was aware of the Plaintiffs/sub-tenants living in the Cabin at the rear of the Property about 60 metres behind the main house, and had intrinsic knowledge of the Property and being aware that the location where the Notice was placed was a location where it was unlikely to be found.
70. The Notice had a 7 day requirement to dispute the Notice, by applying to QCAT under section 356 of the Act, otherwise the Property was deemed to be abandoned.
71. The Notice was not responded to, as it had not been found, despite the Beneficiary and the Second Plaintiff being in lawful possession of the Property at all times up to 8 September 2015 and being in attendance at the Property multiple times during the purported period of abandonment.
72. The Beneficiary and Second Plaintiff first became aware of the Notice by way of an emailed letter at 4.48pm on 8 September 2015 from the Second Defendant's solicitor which stated;
- "On 29 August 2015 the Trustee served at the Property a Form 15.....  
.....In the premises, as of 8 September 2015 our client was entitled to enter and take possession of the Property and has done so."*
- 72.1 The Second Plaintiff immediately emailed the Second Defendant and his solicitor the following message; "THIS IS FALSE NO NOTICE WAS SERVED OR RECEIVED".
73. Shortly after, on attending the Property on 8 September 2015, the Second Plaintiff :
- (a) found the Second Defendant's agent in possession of the Property who stated to the Second Plaintiff; ***"you found the Form 9, but you didn't find the Form 15 you dick head"***; and
  - (b) whereupon the agent pointed out the envelope containing the Form 15 Notice; and
  - (c) consequently the Notice became served on the Second Plaintiff; and

- (d) as the issue date on the Notice was 29 August 2015, 9 days had elapsed causing the required statutory 7 day response time to dispute the Notice to QCAT, to have passed.
74. Having been called a dick head for not finding the Notice, the Second Plaintiff concluded that the exercise regarding the Notice was unconscionable containing the elements of a trick, in a form of deception to claim that the Notice was literally served, when in fact the First Defendant had provided information to place it where it was unlikely to not be found, as pleaded at paragraph 69.
75. The Second Plaintiff twice requested the Second Defendant's agent to leave as he was trespassing, the agent refused both requests and said he was acting on behalf of the trustee (the Second Defendant) who now has possession of the Property.
76. The Second Plaintiff requested the Second Defendant's agent to provide his name and identification, the agent refused.
- 76.1 The Second Plaintiff noticed that :
- (a) to gain entry an existing lock on a gate had been cut, and that a lock on the main house had been forcibly removed and broken;
  - (b) providing evidence of forcible entry; and
  - (c) the agent had parked his car in front of a *no entry - private property* sign.
77. As the agent/s were acting within the scope of the Second Defendant's authority, the Second Defendant is liable for all the illegal trespasses and unconscionable conduct consisting of trickery surrounding the matters pleaded at paragraphs 66 to 69.
78. The Company and the Beneficiary and the Second Plaintiff, had never contemplated an abandonment because of :
- (a) the common intention trust; and
  - (b) they having lawful possession; and
  - (c) the contributions and improvements caused via the Company, as pleaded at sub-paragraph 21(b) and the improvements at paragraph 22; and
  - (d) numerous chattels including 2 shipping containers remaining on the Property that the Beneficiary was in the process of selling; and
  - (e) are not the sort of people that do that, and find the allegation to be insulting.

79. The Property had not been abandoned by the Beneficiary, the Second Plaintiff or the Company and there were no reasonable grounds to believe it was abandoned by reason of the matters pleaded at paragraph 78.
80. While acting under the said ineffective authority of the Power of Attorney, and the conduct pleaded at paragraphs 59 to 79, the Second Defendant's had caused, authorised and directed his agent or agents to commit :
- (a) unlawful entry onto the Property by common law trespass; and
  - (b) contravention of the following legislations;
    - (i) section 202 of the Act - Unlawful entry of premises; and
    - (ii) section 36 of the Debt Collectors (Field Agents and Collection Agents) Act 2014 - Unlawful entry; and
    - (iii) section 48A of the Invasion of Privacy Act 1971 - Unlawful entry of dwelling houses; and
  - (c) unconscionable conduct, in dealing with the Beneficiary and the Second Plaintiff by way of the trick in the placement of Form 15 Notice as pleaded at paragraph 74; and
  - (d) gain possession of the Property by trespass and unlawful means.
- 80.1 By reason of the matters pleaded at paragraphs 66.1 and 80, :
- (a) the First Defendant had no power to issue the Notice; and
  - (b) the Notice was served unlawfully; and
  - (c) accordingly, the service of the Notice was invalid; and
  - (d) accordingly, the Notice was ineffective and null and void.
81. In the premises, the Beneficiary and the Second Plaintiff were caused to lose lawful possession of the Property and be wrongly evicted.
- 81.1 Consequently the trespass of 8 September 2015, became a continuing trespass for each and every day thereafter until the Property was sold on or about 15 March 2016.
82. The Beneficiary and Second Plaintiff were wrongly evicted when :
- (a) the Beneficiary was entitled to possession of the Property for the reasons given at at particulars 9C and 9D and paragraph 16; and
  - (b) the Second Plaintiff was entitled to possession of the Property by virtue of :
    - (i) holding a sub-lease from the Company per particulars 9D; and
    - (ii) the Beneficiary permitting him to reside at the Property; and

(c) but for the wrongful eviction, the Beneficiary, the Second Plaintiff and the Company could have defended their possession of the Property by way of the Second Defendant's intended application to QCAT for a termination order and Warrant of Possession of the Property, where some same relevant facts as are pleaded herein, could have been argued in defence of that application.

83. The wrongful trespass and eviction of the Beneficiary and Second Plaintiff caused them to suffer hurt, mental distress, humiliation with loss of dignity, for which damages are now being claimed to vindicate their rights.

84. Consequently the Beneficiary and Second Plaintiff seek declarations and claim damages for the conduct pleaded at paragraphs 58 to 83 constituting trespass, continuing trespass, wrongful eviction and unconscionable conduct, as set out in the Claim.

#### **AGGRAVATION OF THE WRONGFUL TRESPASS AND EVICTION BY DEFAMATION**

85. Subsequent to the Beneficiary and the Second Plaintiff being wrongly evicted, the Second Defendant under his ineffective Power of Attorney exposed the Property for sale via his real estate agent Wythes, by a sales contract that bears the date of commencement as 14 September 2015.

86. The Second Defendant caused a licensed field agent acting within the scope of the Second Defendant's authority, to affix an Offending Notice dated 8 September 2015 printed on Rodgers Reidy (QLD) Pty Ltd letterhead;

(a) of whom the Second Defendant was a director; and

(b) signed by the Second Defendant as Trustee of the bankrupt estate of the Second Plaintiff;

on a window in an entrance door to the main house from the deck on the Property.

86.1 The Offending Notice was affixed to the window on or about 8 September 2015 and was thereby published and re-published continuously over the extended period of the Property being offered for sale and auction by Wythes until being sold on or about 15 March 2016.

86.2 A copy of the Offending Notice is attached hereto as schedule "A" and the word "NOTICE" at the top of the publication being in bold red print on an original.



87. The Offending Notice and words in the the Offending Notice :
- (a) were of and concerning the Beneficiary and Second Plaintiff; and
  - (b) expressly referred to a Notice of Termination for Abandonment; and
  - (c) expressly mentioned the Beneficiary and Second Plaintiff; and
  - (d) expressly mentioned the Property; and
  - (e) expressly mentioned the Company however the Company makes no claim in this proceeding.
88. The Offending Notice, in its natural and ordinary meaning :
- (a) imputed that the Beneficiary and the Second Plaintiff had abandoned the Property; and
  - (b) was reasonably understood by its readers to refer to the Beneficiary and the Second Plaintiff abandoning the Property.
89. The Offending Notice was defamatory of the Beneficiary and the Second Plaintiff, because they were identified as being the abandoners in the Offending Notice.
90. The Offending Notice imputing that the Beneficiary and the Second Plaintiff had abandoned the Property was entirely false as they did not abandon the Property.
- 90.1 The Beneficiary and the Second Plaintiff had not abandoned the Property because on 7 September 2015 as pleaded at particulars 63A and 63C above, along with many other times during the period of purported abandonment, the Beneficiary and the Second Plaintiff had been in attendance at the Property.
- 90.2 Further, on 5 November 2015, by the Second Defendant authorising his solicitor to accept personal service and together with his solicitor Archibald & Brown, were both personally served with substantial evidence including sworn affidavits of the Beneficiary and Second Plaintiff, that the Property had not been abandoned, together with a Supreme Court authority defining abandonment.
- 90.3 The personal service to the Second Defendant via his solicitor together with his solicitor, were made pursuant to an order by QCAT made on 22 October 2015.
91. By emailed letter dated 6 November 2015 the Second Plaintiff gave notice to Wythes of objection to the Offending Notice and its defamatory nature and demanding its immediate removal.

92. On or about 6 November 2015, the Second Defendant received a copy of that letter from Wythes.
93. The Second Defendant, not concerned with the truth of the matter confirmed instructions to Wythes to not remove the Offending Notice.
94. The Offending Notice was removed from its then current location and re-affixed to a different window where it was not visible from outside the Property in order to try and cause the belief that it had been removed completely.
95. The re-affixing of the Offending Notice amounted to its re-publication when there was no reason re-publish it and there was no reason to maintain the length of the period of its publication beyond its original purpose of notification to the Beneficiary and the Second Plaintiff and the Company on or about 8 September 2015.
  - 95.1 The continued publishing of the Offending Notice beyond a reasonable time or at all, together with the re-publishing of the Offending Notice, was calculated to disparage the Beneficiary and Second Plaintiff.
  - 95.2 The Second Defendant was motivated by malice in causing the non-removal of the Offending Notice and re-publishing it, while knowing that the abandonment was untrue.
96. The Offending Notice was published to multiple prospective purchasers introduced by Wythes to the property together with other persons such as agents, valuers and persons for building inspections that visited the Property during it being offered for sale and auction while in the control of the Second Defendant.
97. The Offending Notice would result in any ordinary reasonable person identifying the Beneficiary and the Second Plaintiff as abandoners and think less of them.
98. The Second Plaintiff forwarded a Concerns Notice dated 11 April 2016 to the Second Defendant who replied via his solicitor's letter dated 29 April 2016.

99. Despite the matters pleaded at paragraphs 63, 72.1, 90.1 to 92, the Second Defendant was unrepentant and dismissive in his letter of reply and denied liability and (amongst other things) denied that the Offending Notice made any reference to the Beneficiary and the Second Plaintiff, which was untrue.
100. The Second Defendant's untruthfulness, outrageous and unrepentant attitude and dismissiveness caused outrage, anger, hurt and injury where the Second Defendant knew that emotional distress would be the likely result of his conduct.
101. The Second Plaintiff forwarded a Concerns Notice dated 9 May 2016 to the company owner of Wythes, being Living Success Ezi Pty Ltd.
102. In reply to that letter by Carter Newell solicitor for Living Success Ezi Pty Ltd dated 1 June 2016, it was stated :
- ...our client's authority did not relevantly extend to removing the Notice from the Property, in direct violation of the instructions our client had received not to remove the Notice..... Thus, our client considers that your allegations are best directed towards the Trustee.*
- 102.1 The Trustee in this context being the Second Defendant.
103. The defamation of the Beneficiary and the Second Plaintiff has caused severe aggravation and insult to the hurt, mental distress, humiliation with loss of dignity already suffered by matters pleaded at paragraphs 83 and 84 for which they now seek aggravated damages and vindication as set out in the Claim in this proceeding.
104. The hurt, mental distress, humiliation with loss of dignity suffered by the Beneficiary and Second Plaintiff has been further aggravated by the Second Defendant's extreme, outrageous, unrepentant, untruthful and dismissive attitude as pleaded at paragraph 100, in ignoring the actual truth of the matter for which further aggravated damages are claimed as set out in the Claim in this proceeding.

#### **FURTHER DAMAGES AS A RESULT OF THE CONDUCT OF THE SECOND DEFENDANT**

105. In early 2015 the Beneficiary wished to sell the Property and repair work was underway to bring the Property to a suitable standard to sell.

106. By reason of the Second Defendant's :
- (a) knowing assistance to the First Defendant's breach of her obligations as pleaded at paragraph 54; and
  - (b) his contrived ineffective belief in having the First Defendant's Power of Attorney as pleaded at paragraph 54; and
  - (c) when the the Property was non-divisible property as pleaded at sub-paragraph 55(a); and
  - (d) accordingly his dealing in the Property was ultra vires as pleaded at sub-paragraph 55(b); and
  - (e) the consequential wrongful eviction and loss of the Beneficiary and Second Plaintiff's possession of the Property by the continuing trespass as pleaded at paragraph 81.1 :
    - (i) the repair work ceased; and
    - (ii) providing underground power and services to the Cabin ceased; and
- consequently, the Property could not be brought up to a suitable standard to reach its potential value.
107. Further to the ceasing of work, while under the Second Defendant's control, the Property was uninhabited and consequently became subject to :
- (a) being not maintained and to become dirty, untidy and overgrown with substantial weeds giving a dilapidated and unattractive appearance; and
  - (b) be vandalised; and
  - (c) be subject to various thefts; and
  - (d) consequently the Property became diminished in value.
108. By reason of matters pleaded at paragraphs 106 and 107 :
- (a) the Property failed to be brought up a suitable standard to be put on the market in order to achieve a price better than what was paid in 2006, being \$350,000 a figure supported by 2 valuations by registered valuers; and
  - (b) the Property since its purchase in 2006, had substantial improvements as pleaded at paragraph 22; and
  - (c) the Property only achieved a price of \$348,000 which was :
    - (i) lower than the purchase price of \$350,000; and
    - (ii) substantially lower than what could have been achieved but for the continuous trespass caused by the Second Defendant; and
    - (iii) which was a selling price in line with the Second Defendant's reserve price of \$420,000 for his 17 October 2015 auction.

109. Consequently the Beneficiary claims damages from the Second Defendant for the Property selling for substantially lower than its potential as set out in the Claim in this proceeding.
110. On 2 July 2015 by email from the Beneficiary's solicitor, the Beneficiary and Second Plaintiff became aware that the First Defendant had provided the Second Defendant a Power of Attorney to sell the Property.
- 110.1 Knowing of what their daughter the First Defendant had done, caused the Beneficiary and Second Plaintiff to become upset and mentally distressed about not knowing the outcome of this event and having accumulated a large amount of possessions and chattels at the Property which would take a substantial amount of time to sort pack and remove if there was a termination order and Warrant of Possession of the Property.
111. Accordingly the Beneficiary and Second Plaintiff were put to the expense of finding alternative accommodation, and on 14 July 2015 they signed a rental agreement for the property at 4 Spicer Street Gympie.
- 111.1 Consequently the Beneficiary and Second Plaintiff claim damages for being put to the expense of alternative accommodation which are particularised in the Claim.

#### **THE BENEFICIARY'S CAVEAT AND RESULTING DISTRICT COURT PROCEEDING**

112. On 7 October 2015, the Beneficiary's solicitor registered a caveat over the Property with dealing number 716804235.
113. On 13 October 2015 in reaction to the Beneficiary's caveat, the Second Defendant in his assumed capacity as attorney for the First Defendant :
- (a) unconcerned that without a Court order to say otherwise, the Property was non-divisible property;
  - (b) unconcerned that his authority under the Power of Attorney was ineffective and ultra vires, because of the way that he achieved it;
  - (c) unconcerned with increasing costs and the limited equity in the Property that he was required to take into consideration, because of paragraph 29;
- issued to the Beneficiary a notice under section 126 of the Land Titles Act.

114. Due to the section 126 notice, on 21 October 2015, the Beneficiary's solicitor filed proceeding 150/15 at the Maroochydore registry of the District Court of Queensland.
115. The Beneficiary claimed (inter alia) as the Plaintiff in the 150/15 proceeding against the first defendant in that proceeding (being the First Defendant in this proceeding) :  
*A declaration that the Defendant holds real property at 63 Nandroya Road, Cooroy being Lot 766 on RP 910330 (the property) upon trust for the Plaintiff.*
116. By reason of the First Defendant being estranged from the Beneficiary and Second Plaintiff, the Beneficiary's solicitor found that he was unable to personally serve the First Defendant with the 150/15 Originating Process.
117. By reason of the Beneficiary's solicitor failing to provide notice to the Department of Natural Resources and Mines pursuant to section 126(4)(b) of the Land Title Act 1994 that the proceeding 150/15 had commenced, the Beneficiary's caveat lapsed 14 days after being lodged.
118. The Beneficiary's caveat remained registered on the Property title until 19 February 2016 when it was removed.

#### **THE BREACH OF AGREEMENT TO PAY PROCEEDS OF SALE INTO COURT**

119. Prior to the caveat being removed from the title, on 3 December 2015 the Beneficiary via her solicitor made a binding agreement (the Agreement) with the Second Defendant via his solicitor to pay the net proceeds of any sale of the Property into the District Court in order for the Court to determine to whom the proceeds belong to.

#### **PARTICULARS OF AGREEMENT**

- A. Letter of First Plaintiff's solicitor dated 3 December 2015 proposing the agreement.
- B. Letter of Second Defendant's solicitor dated 3 December 2015 notifying that the Second Defendant is amenable to the agreement to permitting the sale of the property on the basis of the sale proceeds being paid into Court pending the outcome of this proceeding and proposed the following terms of the agreement.
- C. The terms of the agreement were verbatim :

1. *The lodgement costs of each party providing their respective Withdrawal of Caveat to permit the Contract to settle. This is because they will be provided to the Purchaser's Financier at settlement and lodged by them.*
  2. *The usual adjustments at settlement.*
  3. *Any amount owing to Bankwest pursuant to the mortgage over the Property.*
  4. *Any commission payable to the Real Estate Agent.*
  5. *The reasonable conveyancing costs capped at \$880.00 including GST.*
  6. *The First Plaintiff solicitor's Pomona Office shall conduct the conveyance on behalf of the Vendor.*
  7. *The First Plaintiff's solicitor will be responsible for the payment of the proceeds into Court within 7 days of settlement.*
- D. Letter of First Plaintiff's solicitor dated 3 December 2015 agreeing to these terms and thus establishing a binding Agreement.
- E. Letter of First Plaintiff's solicitor dated 7 March 2016 reminding the Second Defendant and his solicitor of their obligation under the Agreement.

120. On 16 February 2016 the Beneficiary was informed by her solicitor that the Second Defendant had entered a contract to sell the Property for a sale price of \$348,000 and a copy of the contract was emailed to the Beneficiary.

#### PARTICULARS OF CONTRACT

- A. The seller was the Second Defendant as Power of Attorney for the First Defendant.
- B. The contract date was 15 February 2016.
- C. The settlement was due on 16 March 2016.

120.1 By failing to administer what the Second Defendant perceived as divisible property in an efficient and commercially sound way as required by his duties pleaded at paragraph 29, the Second Defendant became aware that his costs exceeded his purported 50% equity in the proceeds of the Property sale, which he had claimed by his counterclaim in the 150/15 proceeding.

121. The Second Defendant knew that he had to breach the Agreement and keep all the net proceeds of sale, in order to recover his costs pleaded at paragraph 120.1.
- 121.1 Accordingly, the Second Defendant's solicitor gave notice to the Beneficiary's solicitor by letter dated 17 February 2016, that his part in performing the conveyance of the Property and paying the proceeds into Court, was terminated.
122. The termination was in breach of terms 6 and 7 of the Agreement.
123. The Beneficiary's solicitor did not convey a copy of the letter or its contents regarding the said termination to the Beneficiary, accordingly the Beneficiary was unaware of the termination.
124. The Beneficiary was also unaware that her caveat had lapsed until the Beneficiary's solicitor notified the Beneficiary of the lapsing on 5 March 2016.
125. On 8 March 2016 the Beneficiary's solicitor notified the Beneficiary that he did not represent her anymore.
126. On or about 15 March 2016, unbeknown to the now unrepresented Beneficiary, the Second Defendant completed the sale of the Property using a solicitor other than the Beneficiary's solicitor for the conveyance as had been agreed by terms 6 and 7 of the Agreement.
127. Unaware of the completion, by correspondence dated 16 March 2016 and 17 March 2016 the Beneficiary wrote to the Second Defendant requesting confirmation that the proceeds of sale were being paid into Court pursuant to the Agreement.
128. The Second Defendant failed to respond to those correspondences.
- 128.1 Declarations resulting from paragraphs 112 to 128 are applied for in the Claim.

#### **BREACH OF AGREEMENT FACILITATED KNOWING RECEIPT OF TRUST MONEY**

129. By emailed letter dated 31 March 2016, the Second Defendant via his solicitor gave notice to the Beneficiary that :

*... settlement of the Cooroy Property has occurred and the proceeds of sale have been distributed in accordance with the Settlement Deed.*



130. Consequently, the Second Defendant :
- (a) had breached the Agreement to pay the proceeds of sale into Court; and
  - (b) had converted the Beneficiary's equitable interest in the Property into the proceeds of sale; and
  - (c) had received those proceeds of sale, in the circumstances of paragraph 131 pleaded below; and
  - (d) the proceeds were distributed as per paragraph 134 below, pursuant to the ***deed of settlement***.
131. The Second Defendant breached the Agreement when he was aware of the following matters :
- (a) that breaching the Agreement was wrong and in patent contravention of a trustee in bankruptcy duties as pleaded at paragraphs 26 to 29;
  - (b) the circumstances of the ***induced statement*** as pleaded above;
  - (c) the Beneficiary's claims in the 150/15 proceeding and claims of of equitable interest in the Property as pleaded at paragraph 30; and
  - (d) his own assertions / admissions of the Beneficiary's equitable interest in the Property as pleaded at paragraphs 31; and
  - (e) he knew that breaching the Agreement, would render the 150/15 proceeding otiose, and the proceeding was in fact rendered otiose as pleaded at paragraph 135 below;
  - (f) the proceeding being rendered otiose would bring an end to the Beneficiary's claim against the First Defendant in that proceeding who is now the First Defendant in the current proceeding; and
  - (g) that by bringing the proceeding to an end, the Second Defendant would be able to distribute all 100% of the proceeds as per paragraph 134 below, instead of what he actually claimed in his counterclaim before the Court;
  - (h) when his counterclaim before the Court was that the Property was held on trust by the First Defendant in equal 50% shares by the Beneficiary and the Second Plaintiff.
- 131.1 In the circumstances pleaded at paragraph 131, the breaching of the Agreement was unconscionable.

132. By reason of the matters pleaded at paragraphs 130, 131 and 131.1, the Second Defendant had unconscionably :
- (a) achieved the outcome he contrived in accordance with his false ***induced statement*** pleaded at paragraph 40, and the falsehoods pleaded at paragraphs 42 and 43 above; and
  - (b) denied the Beneficiary's claim of equitable interest in the Property as pleaded at paragraph 30; and
  - (c) denied the Beneficiary's interest in the Property made by his own assertions / admissions per paragraph 31; and
  - (d) caused considerable inconvenience to the Beneficiary in stifling her opportunity to have the First Defendant served in the 150/15 proceeding.
133. By the Second Defendant evading the jurisdiction of the Court, he had knowingly received the proceeds of the breach of the First Defendant's duties which were in knowing and reckless dishonest and unconscionable denial of trust as pleaded at paragraph 49.
134. The Second Defendant distributed all of the \$42,316.18 trust money in accordance with the ***deed of settlement*** by payments of :
- (a) \$38,971.33 - to himself; and
  - (b) \$3,344.85 - to the First Defendant; and
  - (c) to the exclusion of the Beneficiary;
- accordingly, the elements of Constructive Trusts arose for the Beneficiary.
135. As a consequence of the breach of Agreement, the Beneficiary's 150/15 proceeding was struck out for the following reasons enunciated by His Honour Robertson DCJ at paragraph 39 of his reasons for judgment delivered on 3 June 2016 :
- [39] *As the land has been sold and the proceeds (\$42,316.18) disbursed, these claims are futile and incapable of succeeding...*
- [43] order 3 *....I order that the Claim and the Statement of Claim filed 21 October 2015 be struck out and leave to re-plead is refused.*
136. The \$38,971.33 proceeds held by the Second Defendant are :
- (a) in circumstances that give rise to a Constructive Trust for the Beneficiary; or
  - (b) otherwise in keeping with his said duties set out at paragraphs 26 to 29;
  - (c) alternatively he has been unjustly enriched;
- subject to the finding of this current Court proceeding.

137. In the premises the Second Defendant *'knowingly received'* the trust money that was converted from the Property as pleaded at paragraphs 129 to 136, as in the first limb of ***Barnes v Addy***.

138 This current Court proceeding is a direct consequence :

- (a) of the Second Defendant's breach of Agreement causing the 150/15 proceeding to end prematurely; and
- (b) to inter alia, claw back the trust money; and
- (c) be returned to the position prior to the breach.

139 Declarations and orders resulting from paragraphs 129 to 138 are applied for in the Claim.

#### **MISFEASANCE IN PUBLIC OFFICE / BREACH OF DUTY**

140. At all times material to this proceeding, the Second Defendant held a public office by reasons that include :

- (a) the matters pleaded at paragraph 4 above; and
- (b) performing a public function in exercising a power incidental to his office in the administration of the estates of bankrupt persons and the estate of the bankrupt Second Plaintiff; and
- (c) in performing that function, he exercises a public duty for the public welfare.

141. At all times material to this proceeding, the Second Defendant was required to act in accordance with the public duties of a trustee in bankruptcy as set out at paragraphs 26 to 29 above.

142. The public duties owed included :

- (a) a statutory duty; and/or
- (b) a fiduciary duty; and/or
- (c) a common law duty of care.

143. The Second Defendant's public duties were owed to the Beneficiary with whom, in his professional position as a trustee in Bankruptcy, he had contact with.

**THE PARTICULARS OF CONTACT AT PARAGRAPHS 30 AND 31, ARE REPEATED**

144. By reason of matters culminating in the pleading at paragraph 55 :
- (a) the Property was non-divisible property and unavailable to the Second Defendant as a trustee in bankruptcy performing functions of the Bankruptcy Act; and
  - (b) consequently, the Second Defendant's dealing with the Property was ultra vires and outside the scope of a trustee in bankruptcy performing functions of the Bankruptcy Act, in only being able to deal in divisible property.
145. The Beneficiary had an equitable interest in the Property by virtue of the matters pleaded at paragraphs 5 to 8, 14 to 16 and sub-paragraph 21(b) and paragraph 22.
146. The Second Defendant knew the Beneficiary had an equitable interest in the Property by virtue of the pleading at paragraph 32.
147. In pursuit of following his line of conduct in contriving the *induced statement* and Power of Attorney and *deed of settlement* as set out at paragraphs 34 to 57, and assisting the First Defendant's breach of trust obligations, the Second Defendant :
- (a) dealt with the Property while knowing he was doing so without proper authority because of his contrivances;
  - (b) closed his eyes to the truth of the matter;
  - (c) was recklessly indifferent to the harm that is likely to ensue;
  - (d) wilfully and recklessly failed to make inquiries that an honest and reasonable person would have made regarding the Beneficiary's equitable interest in the Property.
148. With actual knowledge of the Beneficiary's equitable interest in the Property, the Second Defendant's duties required him to acknowledge the Beneficiary's equitable interest and deal with the Property in accordance with that interest.
149. It was foreseeable to the Second Defendant, that embarking on a course of ignoring the Beneficiary's equitable interest and breaching the Agreement to pay the proceeds of sale of the Property into Court :
- (a) would be detrimental to the Beneficiary in being unable to pursue her claims in the 150/15 proceeding in the District Court; and
  - (b) be of concern to the Court, which it was; and
  - (c) would enable him to distribute the proceeds of sale of the Property to other than the Beneficiary as pleaded at paragraph 134.

150. In the premises, the Second Defendant has exercised his power of public duty as a trustee in bankruptcy :
- (a) contrary to what is required by the duties at paragraphs 141 and 142; and
  - (b) he knew that his power was contrived and spurious; because
  - (c) it was grounded in his own shortcoming of contrivance surrounding his **induced statement** and Power of Attorney and **deed of settlement** ; and
  - (d) as such, is a deliberate and reckless misuse of power.
151. The exercising of that public duty was accompanied by one or more of the following forms of bad faith or malice in connection with the matters set out at paragraph 152 below :
- (a) knowing that he was acting in excess of his power with the intention to cause harm to the Beneficiary and the Second Plaintiff;
  - (b) recklessly indifferent to whether he acted beyond his power and recklessly indifferent to the likelihood of harm being caused to the Beneficiary and the Second Plaintiff;
  - (c) when there was a foreseeable risk of harm to the Beneficiary and the Second Plaintiff.
152. The Second Defendant's said bad faith or malice was perpetrated in the circumstances of one or more of sub-paragraphs 151(a) or 151(b) or 151(c), and while in breach of one or more of his required public duties per paragraphs 26 to 29, the Second Defendant has wrongly administered :
- (a) non-divisible property; and
  - (b) acted ultra vires in having no actual authority to deal with the Property; and
  - (c) subsequently dealt with the Property by way of;
    - (i) wrongly and knowingly inducing, assisting or unduly influencing the First Defendant to breach the trust, fiduciary duty to the Beneficiary, and the unconscionable denial of those duties per paragraphs 33 to 57; and
    - (ii) wrongly causing the service of the Form 15 Notice without authority, by trespass, and in breach of the legislations pleaded, and by unconscionable conduct; and
    - (iii) wrongly laying claim to and seizing the Property by trespass and continuing trespass per paragraphs 58 to 84; and

- (iv) wrongly evicting the Beneficiary and Second Plaintiff from the Property per paragraphs 58 to 84; and
- (v) wrongly aggravating the trespass and eviction by defamation of character per paragraphs 85 to 104; and
- (vi) being motivated by malice in failing to remove defamatory material per paragraph 95.2; and
- (vii) wrongly causing damage to the Property value per paragraphs 105 to 109; and
- (viii) wrongly causing the Plaintiffs to have to seek alternative accommodation and thereby causing the damages claimed at paragraphs 110 to 111.1; and
- (ix) inefficiently administering the estate by causing fees and legal fees to exceed the value of the estate's purported divisible property value per paragraph 120.1; and
- (x) wrongly breaching the Agreement to pay the proceeds into Court per paragraphs 119 to 128.1; and
- (xi) per paragraphs 129 to 139, wrongly and knowingly receiving the trust money caused by the First Defendant's breach of trust, fiduciary duty and unconscionable denial of the Beneficiary's equitable interest, per paragraph 49; and
- (xii) making an improper gain from his position by distributing non-divisible proceeds of sale to himself.

153. In the premises of violating the required standard of care by bad faith or malice, the Second Defendant is liable for :

- (a) misfeasance in public office; and/or
- (b) wilful default or breach of trust; and

accordingly is in **breach of duty** as interpreted by sub-section 5(1) of the Bankruptcy Act 1966.

154. The proximate result of the matters set out at paragraphs 140 to 153, is that the Beneficiary suffered the damages complained of herein, which are set out in the Claim.

**THE FIRST PLAINTIFF (BENEFICIARY) CLAIMS RELIEF BY REQUESTING THE COURT TO GRANT THE FOLLOWING DECLARATIONS**

**DECLARATIONS of Constructive Trust :**

1. A common intention Constructive Trust between the First Defendant as trustee for the Craven family beneficiary, be declared in accordance with the intent of the parties regarding the Property as pleaded at paragraphs 5 to 8.
2. In the event of a common intention Constructive Trust being declared at 1, in accordance with the intent of the parties as pleaded at paragraphs 14 and 15, it be declared that the beneficiary of that Constructive Trust be varied from the Craven family to the First Plaintiff.
3. In the circumstance pleaded at sub-paragraph 21(b) and paragraphs 22, a Constructive Trust be declared in favour of the First Plaintiff for the mortgage and improvement contributions that were put to the common intention of the Craven family.
4. In the circumstance of the pleadings at paragraph 49, a Constructive Trust be declared in favour of the First Plaintiff, because the First Defendant denied the equitable interest of the First Plaintiff and the Craven family.
5. In the circumstance of the pleadings at paragraphs 136, a Constructive Trust be declared in favour of the First Plaintiff, for the \$38,971.33 that the Second Defendant distributed to himself.
- 5A. Alternatively, a declaration that the Second Defendant has been unjustly enriched by an amount of \$38,971.33.
6. In the circumstance of the pleadings at paragraphs 134(b), a Constructive Trust be declared in favour of the First Plaintiff, for the \$3,344.85 that was distributed to the First Defendant.
- 6A. Alternatively, a declaration that the First Defendant has been unjustly enriched by an amount of \$3,344.85.

**DECLARATIONS relating to paragraph 17 of the Statement of Claim :**

7. A declaration that the First Defendant held real property at 63 Nandroya Road, Cooroy being Lot 766 on RP 910330 (the Property) upon trust for the Craven family.
8. A declaration that from 22 October 2009 until the time of the sale of the Property, the First Defendant held the Property upon trust for the First Plaintiff.
9. A declaration that at all times material until the time of the sale of the Property, the Beneficiary had :
  - (a) a right of possession of the Property; and
  - (b) a right of residence at the Property.

**DECLARATIONS relating to paragraph 57 of the Statement of Claim :**

10. A declaration that the First Defendant had no power or authority to agree to and execute the Power of Attorney and the Deed of Settlement regarding the Property.
11. A declaration that the First Defendant had committed :
  - (a) a breach of trust to the Beneficiary;
  - (b) a breach of fiduciary duty to the Beneficiary;
  - (c) a denial of the existence of the trust and fiduciary duty by unconscionable conduct and equitable fraud.
12. A declaration that the Second Defendant knowingly assisted, induced or unduly influenced, the First Defendant to breach her obligations to the Beneficiary according to the second limb of *Barnes v Addy*.
13. A declaration that the Power of Attorney was ineffective.
14. A declaration that the Deed of Settlement was ineffective.
15. A declaration that the Property was non-divisible property.
16. A declaration that the Second Defendant's conduct in dealing with the Property was ultra vires.



**DECLARATIONS relating to paragraph 84 of the Statement of Claim :**

17. A declaration that the Second Defendant had knowingly caused multiple trespass on the Property.
18. A declaration that the Second Defendant had knowingly caused a continuing trespass on the Property.
19. A declaration that the circumstances surrounding the serving of the Form 15 Notice was unconscionable and of no effect.
20. A declaration that the Form 15 Notice was of no effect.
21. A declaration that the First Plaintiff did not abandoned the Property.
22. A declaration that the Second Defendant wrongly caused the eviction of the First Plaintiff from the Property.

**DECLARATION relating to paragraph 128.1 of the Statement of Claim :**

23. A declaration that the Second Defendant breached the Agreement.

**DECLARATION relating to paragraph 139 of the Statement of Claim :**

24. A declaration that the Second Defendant knowingly received the trust money as in the first limb of *Barnes v Addy*.

**DECLARATIONS relating to paragraphs 140 to 154 of the Statement of Claim :**

25. A declaration that the Second Defendant :
  - (a) has conducted misfeasance in public office;
  - (b) alternatively, is in breach of duty.

**THE FIRST AND SECOND PLAINTIFFS CLAIM THE FOLLOWING DAMAGES**

1. In relation to paragraph 84 of the Statement of Claim, the First and Second Plaintiffs claim damages of \$150,000 from the Second Defendant for :
  - (a) trespass; and
  - (b) continuing trespass; and
  - (c) wrongful eviction; and
  - (d) unconscionable conduct;

**PARTICULARS**

- A. Vindication and compensation for the hurt, mental distress, humiliation with loss of dignity suffered by both Plaintiffs.
  - B. The unconscionable conduct surrounding the service of the Form 15 Notice.
2. In relation to paragraph 104 of the Statement of Claim, the First and Second Plaintiffs claim damages of \$100,000 from the Second Defendant for :
    - (a) aggravation of the trespass and wrongful eviction; and
    - (b) malice;

**PARTICULARS**

- A. There has been an intentional special humiliation of the Plaintiffs by the Second Defendant causing substantial aggravation to the hurt, mental distress, humiliation, insult and loss of dignity to the First and Second Plaintiffs.
  - B. The First and Second Plaintiff's knowledge of :
    - (a) the imputation being untrue;
    - (b) the Second Defendant knowing that it was untrue.
  - C. The unjustifiable failure of the Second Defendant to retract, correct, retract, apologise or do anything to address the wrongful publication and re-publication of the Offending Notice.
3. In relation to paragraph 111.1 of the Statement of Claim, the Defendants are jointly and severally liable for damages of \$8,575.00 for accommodation expenses.

**PARTICULARS**

- A. Period claimed between start of tenancy at 4 Spicer Street, Gympie being 14 July 2015 to completion of the sale of the Property occurring on 15 March 2016.
- B. This period is chosen to be reasonable considering that without the breach of obligations by the First Defendant and interference of the Second Defendant, the Property would have been brought up to a reasonable standard for sale and be sold by First Plaintiff Beneficiary by 15 March 2016.
- C. The period being 35 weeks at \$245.00 per week = \$8,575.00

**THE FIRST PLAINTIFF CLAIMS RELIEF BY REQUESTING THE COURT TO GRANT THE FOLLOWING ORDERS FOR SURRENDERING TRUST MONIES AND DAMAGES**

1. An order that the Second Defendant deliver to the First Plaintiff the \$38,971.33 component of proceeds of the sale of the Property, or any alternative amount that he has received.
  - 1A. Alternatively, equitable damages in the sum of \$38,971.33.
2. An order that the First Defendant deliver to the Beneficiary the \$3,344.85 component of proceeds of the sale of the Property, or any alternative amount that she has received.
  - 2A. Alternatively, equitable damages in the sum of \$3,344.85.
3. In relation to paragraph 109 of the Statement of Claim, the First Plaintiff claims damages of \$42,000 from the Second Defendant.

**PARTICULARS**

- A. Selling the Property for \$348,000 when its potential was \$410,000
  - B. Less \$10,000 for materials
  - C. Less \$10,000 agents fees etc.
4. Interest on damages pursuant to section 58 of the Civil Proceedings Act 2011.

**THE SECOND PLAINTIFF CLAIMS RELIEF BY REQUESTING THE COURT TO GRANT THE FOLLOWING DECLARATIONS**

1. A declaration (relating to paragraphs 42 to 44) that the Second Plaintiff did not provide the deposit monies to purchase the Property.
2. A declaration (relating to paragraph 42 to 44) that the Second Plaintiff did not arrange for the title of the Property to be in the name of the First Defendant for the purpose of defeating creditors.
3. A declaration that the Second Plaintiff did not abandon the Property.
4. A declaration that the Second Defendant wrongly caused the eviction of the Second Plaintiff from the Property.

**CONCURRENT RELIEF FOR MISFEASANCE IN PUBLIC OFFICE / BREACH OF DUTY**

Damages for misfeasance in public office or breach of duty is claimed concurrently with the damages already claimed from the Second Defendant :

**PARTICULARS OF CLAIM BY FIRST PLAINTIFF**

- A. For the total amount of trust money received by the Second Defendant before distribution..... \$42,316.18
- B. For selling the Property for less than its potential..... \$42,000

**PARTICULARS OF CLAIM BY FIRST AND SECOND PLAINTIFFS**

- C. For accommodation expenses..... \$8,575
- D. For the :
  - (a) trespass; and
  - (b) continuing trespass; and
  - (c) wrongful eviction; and
  - (d) unconscionable conduct..... \$150,000
- E. For the aggravation of trespass and wrongful eviction..... \$100,000

**EXEMPLARY DAMAGES**

Exemplary damages are claimed against the Second Defendant for \$200,000

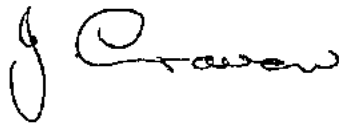
**PARTICULARS**

- A. There needs to be a strong message to other trustees and trustees in bankruptcy and a need to deter conduct that directly undermines the high standard required of fiduciaries.
- B. This will provide a strong deterrent effect.
- C. The pleadings in the Statement of Claim demonstrate that the Second Defendant has acted in a morally reprehensible manner, together with intentional, malicious, arrogant, insulting and a conscious contumelious disregard of the rights of the First and Second Plaintiffs, in particular in disregarding the rights of the First Plaintiff Beneficiary who is a non-debtor and done nothing to deserve this conduct by the Second Defendant.
- D. There needs to be a higher award than may normally apply when the defendant is a person in public office that wields statutory power and authority in cynical disregard the rights of others.
- E. In this instance by the matters pleaded at paragraphs 4 and 140 to 143 in the Statement of Claim, the Second Defendant is such a person that wields statutory power and authority.

- F. As in *Plenty v Dillon* and *Kuru v State of NSW* and *NSW v Ibbett* regarding matters involving damages for trespass by police that also wield statutory powers and authority, substantial awards in exemplary damages were made.
- G. The measure of exemplary damages should also be adjusted according to any further denial of liability, high handed or arrogant conduct in the defence pleadings.
- H. If the courts do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a person that wields statutory power and authority.
- I. *Plenty v Dillon* [1991] HCA 5 :  
“*The appellant is entitled to have his right of property vindicated by a substantial award of damages*”

- Such further orders as the Court deems appropriate.
- Costs.

Signed:



Description: Janet Craven - First Plaintiff



Gordon Craven - Second Plaintiff

NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.

# Schedule "A"

Notice of Termination for Abandonment



Our Reference: LEM:150630:9979

8 September 2015

## NOTICE

**RE: DAVID JAMES HAMBLETON AS TRUSTEE FOR THE BANKRUPT ESTATE OF GORDON CRAVEN  
PROPERTY: 63 NANDROYA ROAD, COOROY**

We refer to the above matter and the Notice of Termination for Abandonment which was attached to the property by our investigator, Craig Lindley, at approximately 3.05pm on Saturday, 29 August 2015.

We note that pursuant to section 355 of the *Residential Tenancies and Rooming Accommodation Act* that the tenant has 7 days in which to bring an Application in the Queensland Civil and Administrative Tribunal ("QCAT") disputing the Notice of Termination for Abandonment.

Having made enquiries with QCAT, neither Janet Craven, Gordon Craven or Penny's Flowers Pty Ltd have filed an application in accordance with section 355.

Accordingly, you are hereby authorised and directed to attend the said property on this morning, 8 September 2015 for the purposes of changing the locks on the premises and taking possession of same.

We direct you to deliver the keys to the property following securing same to the following real estate agents in preparation of sale:

Wythes Real Estate, PO Box 407, 36b Maple Street, Cooroy, Queensland 4563.

Please contact me should you have any queries.


Yours faithfully

  
**David Hambleton**  
As trustee of the bankrupt estate  
Of Gordon Craven

Signed under Power of Attorney number 716613321

[www.rodgersreidy.com.au](http://www.rodgersreidy.com.au)

BRISBANE • SYDNEY • DUBBO • MELBOURNE • GEelong  
New Zealand • Singapore • Malaysia • Hong Kong

MEMBER  RIIQ (Real Estate Institute of Queensland)